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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. ~~865~~ [redacted] 23-24

IN THE MATTER OF FORTY-ONE THIRTY-SIX WILCOX BUILDING CORPORATION, A CORPORATION,

Debtor.

CHICAGO TITLE AND TRUST COMPANY, A CORPORATION, AS SUCCESSOR TRUSTEE UNDER THE TRUST DEED RECORDED AS DOCUMENT No. 10325493,

Petitioner,

vs.

FORTY-ONE THIRTY-SIX WILCOX BUILDING CORPORATION, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE MATTER OF FORTY-ONE THIRTY-SIX WILCOX BUILDING CORPORATION, A CORPORATION,

Debtor.

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Petitioner,

vs.

FORTY-ONE THIRTY-SIX WILCOX BUILDING CORPORATION, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Chicago Title and Trust Company, a corporation, as Successor Trustee, submits this petition for a writ of certiorari to review decrees of the United States Circuit Court of Appeals for the Seventh Circuit, entered November 30, 1936, affirming decrees of the United States District Court for the Northern District of Illinois, Eastern Division, and files herewith a certified copy of a complete transcript of the record in said cause; and its brief in support of this petition.

SUMMARY OF THE MATTER INVOLVED.

Two questions are presented by this petition:

1. Does the National Bankruptcy Act empower a corporation which has been dissolved by the authorities of the State of Illinois to file a *voluntary* petition for reorganization under Section 77B of that Act, more than four years after the entry of a judicial decree dissolving the corporation and more than two years after the expiration of the statutory period during which its corporate existence was continued solely for winding up its affairs?

2. Is a court of bankruptcy authorized to exercise jurisdiction under Section 77B, when, prior to the filing of the petition, (a) all property of the debtor corporation has been sold pursuant to judicial decree, the period provided by state law for redemption therefrom has expired, and the holder of the certificate of sale has become absolutely entitled to a deed, and (b), a purported assignment of the certificate of sale to the debtor is void under state law, because of the debtor's lack of corporate capacity to receive it?

STATEMENT.

On April 10, 1929, respondent, Forty-one Thirty-six Wilcox Building Corporation, was organized under the laws of the State of Illinois for the purpose of owning and operating one building (R. 39). Shortly thereafter, it acquired title to a parcel of real estate with the improvements thereon, in the City of Chicago, Illinois, subject to the lien of a first mortgage securing the payment of bonds aggregating $95,000 (R. 71). On December 26, 1929, respondent further encumbered the premises with a junior mortgage securing the payment of its notes for $15,000 (R. 71). These premises are the *only* property ever owned or possessed by respondent.

On May 22, 1931, in a suit brought by the State of Illinois, in the Superior Court of Cook County, Illinois, a decree (R. 51) was entered against respondent finding:

> "Said defendant and its Board of Directors have ceased to transact business as a corporation, have discontinued the exercise of corporate functions and have failed to comply with an Act entitled, 'An act in relation to corporations for pecuniary profit' in force July 1, 1919, and all subsequent amendments thereto, relative to the filing of annual reports and payment of license fees or franchise taxes."

and decreeing:

> "that the said defendant corporation, the Forty-one Thirty-six Wilcox Building Corporation, be, and the same is hereby dissolved, and that the charter and authority of said corporation be, and the same is hereby declared to be null and void and of no force and effect whatsoever * * *."

No appeal was taken from this decree, and no attempt has ever been made to have it set aside.

The Corporation Act of the State of Illinois then in force provided (Smith-Hurd Ill. Rev. Stat. 1929, Chap. 32):

> Section 14: "All corporations organized under the laws of this State, whose powers may have expired by limitation or otherwise, shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporations and selling and conveying the property and effects thereof. Such corporations shall use their respective names for such purposes and shall be capable of prosecuting and defending all suits at law or in equity."
>
> Section 79: "The dissolution, for any cause whatever, of any corporation, shall not take away or impair any remedy given against such corporations, its officers, or stockholders, for any liabilities incurred previous to its dissolution, if suit therefor is brought and service of process had within two years after such dissolution."

On July 10, 1931, a decree was entered by the Circuit Court of Cook County against respondent foreclosing cer-

tain mechanics liens on its premises, subject only to the lien of the first mortgage (R. 55). Pursuant to this decree the premises were sold on August 5, 1931, and a master's certificate of sale was issued to the purchasers entitling the holder thereof to a deed to the premises upon the expiration of the period of redemption (R. 63, 65). Neither respondent nor any of its creditors redeemed from this sale within the period prescribed by the statutes of the State of Illinois (Smith-Hurd Ill. Rev. Stat. 1929, Chap. 77, Sec. 18, 20).

On October 24, 1931, petitioner's predecessor in interest, the Madison & Kedzie State Bank, as trustee under the first mortgage, instituted suit in the Superior Court of Cook County, Illinois, to foreclose the lien of its mortgage (R. 10). On November 10, 1931, the trustee under the junior mortgage also commenced suit in the Superior Court to foreclose the lien of its junior mortgage (R. 71). A receiver appointed in these suits immediately took possession of the premises (R. 71). Respondent was made a party to and appeared in both suits by its attorney; it offered no defense, but its attorney received and checked accounts and reports from time to time served upon parties of record by the receiver (R. 31, 73). After the receiver took possession of its property (October, 1931) respondent did not transact any business (R. 27, 28).

On August 5, 1932, the right of the corporation to redeem from the sale upon the foreclosure of mechanics liens expired (Smith-Hurd Ill. Rev. Stat. 1929, Chap. 77, Sec. 18); and on November 5, 1932, the right of its creditors to redeem from that sale also expired (*Id.* Sec. 22).

On May 4, 1933, the two-year period during which respondent's corporate existence was continued for the purpose of winding up its affairs expired. At that time respondent had no property of any kind, except the bare possibility that the certificate of sale might become void if the

holder failed to take out a deed within five years of the expiration of the period of redemption (Smith-Hurd Ill. Rev. Stat. Chap. 77, Sec. 31)—a possibility which was, in any event, subject to the lien of the first mortgage and the suit then being prosecuted for the foreclosure thereof.

In May, 1935, one Willens conceived a plan for the reorganization of respondent under Section 77B of the Bankruptcy Act. Pursuant thereto, the three persons who now claim to be stockholders of the respondent acquired from the former owners all of its shares of stock. Stockholders' and directors' meetings were held for the purpose of authorizing the filing of the present petition for reorganization (R. 31, 34, 35). Willens then acquired and assigned to the respondent the certificate of sale issued on the foreclosure of the mechanics' liens (R. 35).

On June 13, 1936, respondent filed its petition for reorganization under Section 77B of the Bankruptcy Act (R. 2). Thereafter, it filed its petition praying that the receiver appointed in the foreclosure suits in the state court be directed to turn over to it the premises in his possession and that the complainants in those suits be restrained from the further prosecution thereof (R. 7).

These petitions and the answer thereto of this petitioner were referred to a special master, who reported that respondent had legal capacity to file a voluntary petition under Section 77B and that its petition was sufficient to confer upon the court jurisdiction over the respondent and the premises in question (R. 70). The District Court overruled petitioner's exceptions and confirmed the master's report, appointed a temporary trustee and required the state court receiver to deliver possession of the premises to the trustee, and restrained petitioner from further prosecution of its foreclosure proceedings (R. 79, 80, 83).

Upon appeal, the Circuit Court of Appeals for the Sev-

enth Circuit, in a decision by a divided court, affirmed these decrees (R. 107).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The reasons relied upon for the allowance of the writ herein are:

(1) The present decision is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Vassar Foundry Co.* v. *Whiting Corporation,* 2 F. (2d) 240, where it was held that a Michigan corporation which was dissolved under a statute of that state could not file a voluntary petition in bankruptcy more than four months after its dissolution.

(2) The question, whether a corporation which has been dissolved under the laws of the state of its creation, is a "corporation" eligible to file a voluntary petition for corporate reorganization under Section 77B of the Bankruptcy Act, is an important question of federal law which has not been, but should be, settled by this court. Otherwise the law will remain uncertain in view of the principle expressed by this court in *Oklahoma Gas Co.* v. *Oklahoma,* 273 U. S. 257, *Mumma* v. *Potomac Company,* 8 Pet. 281, and other cases, that upon dissolution, a corporation ceases to exist for any purpose whatsoever.

(3) The Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions, in that it recognizes the validity of a transfer of property (the certificate of sale referred to *supra*) to a dissolved corporation when by the laws of the State of Illinois that transfer was ineffective because of the non-existence of the transferee. If this transfer be disregarded, the important federal question is presented whether the bare possibility remaining in respondent after the expiration of the period of redemption,

that the holder of the certificate might not take out a deed within the statutory period of five years, is a property interest sufficient for administration and reorganization under Section 77B.

4. The questions presented are of public interest, in that:

(a) They involve the right of the State of Illinois to control the existence and duration of corporations which it creates.

(b) They also involve important principles upon which personal and property rights depend. If a dissolved corporation is continued indefinitely for the purpose of filing a petition under the Bankruptcy Act after its complete extinction under state law, and it can in the meantime acquire and convey property and exercise other corporate powers, a condition of uncertainty will arise as to titles to real and personal property in the State of Illinois and doubt will be cast upon every transaction concerning property in which the corporation might have had an interest.

WHEREFORE, petitioner prays that this petition for a writ of certiorari may be granted and that this court proceed as is provided by law and the rules of this court in such cases, and that upon final hearing, the decrees of the United States Circuit Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

SILAS H. STRAWN,
RICHARD H. HOLLEN,
GEORGE W. OTT,
CHARLES J. CALDERINI,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

OPINIONS BELOW.

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals for the Seventh Circuit is printed in full in the record (R. 107) and is reported in 86 F. (2d) 667. The opinion was delivered by District Judge Lindley with whom Circuit Judge Sparks concurred. District Judge Briggle dissented.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240-A of the Judicial Code, as Amended, by the Act of February 13, 1925 (28 U. S. C. A., sec. 347-A). The decrees sought to be reviewed (R. 113, 114) were entered after two appeals, one allowed by the District Court, the other by the Circuit Court of Appeals, had been consolidated (R. 102). The date on which the Petition for Rehearing was denied by order of the Circuit Court of Appeals was January 7, 1937 (R. 115).

III.

STATEMENT OF THE CASE.

The facts pertinent to the questions here presented are sufficiently recited in the Petition under the caption "Statement of Matter Involved."

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

(1) In holding that respondent was a corporation eligible to file a petition for reorganization under Section 77B of the Bankruptcy Act.

(2) In holding that respondent had a property interest sufficient to enable a bankruptcy court to exercise jurisdiction under Section 77B.

(3) In holding that the decree dissolving respondent, and the statutes of the State of Illinois limiting its corporate existence thereafter, were suspended and superseded by the Bankruptcy Act and the proceedings had thereunder.

(4) In holding that its construction of Section 77B of the Bankruptcy Act was not contrary to Article V or Article X of the Amendments to the Constitution of the United States.

(5) In affirming the decrees of the District Court.

V.

SUMMARY OF ARGUMENT.

I.

Two years after the entry of the decree of dissolution respondent ceased to exist as a legal entity. No action could thereafter be commenced by or against it, and it was incapable of performing any corporate acts. By the settled rule of this court it was not entitled to recognition by any federal court. It was not a "corporation" within Section 77B of the Bankruptcy Act because that term, as defined by the Act, contemplates an entity having corporate "powers and privileges." Furthermore, the object of Section 77B is to rehabilitate a debtor, and the provisions of the Section contemplate the continued existence of corporate power. The debtor in this case has alleged and proceeded on the theory that it is an existing corporation.

Recognition of the legal extinction of respondent does not defeat the jurisdiction of the federal courts under the bankruptcy power because no legal entity is before the court. On the contrary, the decision of the Court of Appeals, by ignoring the dissolution, in effect, extends the life of an Illinois corporation in defiance of the law of the state and contrary to the constitutional principle laid down by this court in *Hopkins Federal Savings & Loan Association* v. *Cleary,* 296 U. S. 315, 337.

II.

It is essential to the exercise of jurisdiction under Section 77B that the debtor be possessed of property which can be the subject of reorganization. Its property must be of a

kind and character that can pass to a trustee in bankruptcy that is, it must be capable of being "transferred", or "levied upon and sold under judicial process" within the meaning of Section 70 of the Act. Under state law the interest remaining in respondent after judicial sale and after the expiration of the period of redemption was not such an interest as could be "sold under judicial process". *Commerce Vault Co.* v. *Barrett*, 222 Ill. 169, 175. This interest could not be "transferred" after respondent's corporate existence ceased because it lacked capacity to execute a deed. Nor could respondent enlarge its title after dissolution by acquiring the outstanding certificate of sale, for, under the law of the State of Illinois, it was then incapable of accepting a conveyance or transfer.

By recognizing the validity of the transfer of the certificate of sale to respondent more than four years after its dissolution, the Court of Appeals, by judicial decision, creates property rights which are denied by the law of Illinois, contrary to the fifth and tenth amendments to the Constitution of the United States.

I.

A DISSOLVED CORPORATION HAS NO CAPACITY TO FILE A PETITION FOR CORPORATE REORGANIZATION UNDER SECTION 77B OF THE BANKRUPTCY ACT AFTER THE EXPIRATION OF THE PERIOD PROVIDED BY THE LAW OF ITS CREATION FOR THE WINDING UP OF ITS AFFAIRS.

Two years after the entry of the decree of dissolution, all corporate powers of respondent were extinguished by force of the Illinois statute, and it ceased to exist as a legal entity (Smith-Hurd Ill. Rev. Stat. 1929, Chap. 32, Sec. 14, 79). No action could thereafter be commenced by

or against it, and it was incapable of performing any corporate acts.*

Dukes v. *Harrison & Reidy*, 270 Ill. App. 372, 382:

> "Section 53 of the Corporation Act must be construed with sections 14 and 79 of the same act, and it is apparent that complainant cannot avail herself of the remedy provided by this statute for the reason that her bill of complaint was not filed until September 14, 1931, which was more than two years after the dissolution of the corporation."

Consolidated Coal Company v. *Flynn Coal Co.* 274 Ill. App. 405, 411, adopts and applies the same construction.

A. J. Bates Co. v. *United States* (Ct. Cl.) 3 F. Supp. 245, 248:

> "The period of limitation within which suit by creditors could be instituted against the Illinois corporation, its officers or stockholders, for any liabilities incurred previous to its dissolution, expired on February 10, 1923. From and after that date the Illinois corporation was extinct for all purposes. It was as nonexistent as if it had never been created, had no stockholders or officers, and was incapable of transacting any business whatsoever."

Chas. A. Zahn Co. v. *United States* (Ct. Cl.) 6 F. Supp. 317, 319:

> "Two years after the dissolution of the corporation, or on March 30, 1923, the Charles A. Zahn Company ceased to exist, and became incapable of transacting

* The only case in Illinois which would seem to militate against this principle is *Singer & Talcott Co.* v. *Hutchinson*, 176 Ill. 48, where it was held that a writ of error might be sued out by a dissolved corporation after the expiration of the two-year period, to review a judgment in a suit commenced within the two years. The basis of the holding was that the Constitution and the Practice act of the State preserved to every party to an action the right to prosecute the writ of error. The Court said: "This corporation was kept alive for the purpose of being made such a party to the original action and, being so alive for such purpose, is preserved by the Practice act with authority to prosecute an appeal or a writ of error." (pp. 52, 53).

any business whatever in its corporate capacity. *A. J. Bates Co.* v. *United States* (Ct. Cl.) 3 F. Supp. 245. This suit filed more than six years thereafter, on May 10, 1929, cannot be maintained."

The same effect has been given to similar statutes of other states. (*Dundee Mortgage & Trust Investment Co.* v. *Hughes*, 77 Fed. 855; *Service & Wright Lumber Co.* v. *Sumpter Valley Ry. Co.*, 81 Ore. 32, 149 Pac. 531; *Thornton* v. *Marginal Freight Railway*, 123 Mass. 32; *Maine Shore-Line Co.* v. *Maine Cent. R. Co.*, 92 Me. 476, 43 Atl. 113; *Von Glahn* v. *DeRosset*, 81 N. C. 467; *State* v. *Circuit Court for Milwaukee County*, 184 Wis. 301, 199 N. W. 213; *Peck* v. *Linney*, 97 Wash. 103, 165 Pac. 1080).

By the settled rule of this court dissolution under a state statute completely terminates corporate existence. Thereafter, federal courts will not recognize the dissolved corporation as an entity capable of engaging in litigation or otherwise exercising corporate powers.

Mumma v. *The Potomac Co.*, 8 Pet. 281, 286:

"there is no pretence to say that a *scire facias* can be maintained, and a judgment had thereon, against a dead corporation, any more than against a dead man."

(P. 287):

"A corporation, by the very terms and nature of its political existence, is subject to dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and nonuser. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy and the nature and objects of its charter."

Oklahoma Gas Co. v. *Oklahoma*, 273 U. S. 257, 259:

"It is well settled that at common law and in the federal jurisdiction a corporation which has been dis-

> solved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect. (Citing cases). It follows therefore that, as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law, abates all litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation *pro hac vice*. But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the State which brought the corporation into being."

No reason is apparent why an exception should be made to this rule to permit a dissolved corporation to file a voluntary petition for reorganization under Section 77B of the Bankruptcy Act. (11 U. S. C. A. § 207, 48 Stat. at L. 912, as amended.)

This section authorizes "any corporation, which could become a bankrupt under Section 4 of this Act" to file an original petition. Section 4 extends the right of voluntary bankruptcy to "any person." (11 U. S. C. § 22.) "Person" is defined by Section 1(19) to include "corporations"; and by Section 1(6) the term "corporations" means "all bodies having any of the powers and privileges of private corporations." (11 U. S. C. § 1.) We submit that these definitions contemplate an existing corporation having "powers and privileges", and not one whose powers have been completely revoked. (R. 52.)

The very object of Section 77B is to prevent liquidation and to rehabilitate the debtor. This court stated in its

opinion filed January 4, 1937, in *City Bank Farmers Trust Co.* v. *Irving Trust Co.*, 81 L. ed. 241, 244:

> "The purpose of § 77B was to facilitate rehabilitation of embarrassed corporations by a scaling or rearrangement of their obligations and shareholders' interests, thus avoiding a winding up, a sale of assets, and a distribution of the proceeds."

All of the provisions of Section 77B contemplate that, pending reorganization, the debtor shall be capable of performing corporate functions. The court may authorize the debtor to continue temporarily in possession of its property, to borrow money and issue certificates therefor secured by its assets, to reject executory contracts, and to perform other acts of a similar nature; and other provisions require the debtor to exercise corporate powers.

All of the respondent's acts in this proceeding have been based upon the assumption of the continued existence of its corporate powers, *viz.*, the adoption of resolutions authorizing the filing of the petition, the acquisition of the certificate of sale, the employment of attorneys, the filing of the petition, its appearance and defense of the appeals herein in the Circuit Court of Appeals. In its petition for reorganization filed in the District Court it alleged (Rec. 2, 5):

> "(1) The debtor *is* a corporation organized and existing under the laws of the State of Illinois. • • •
>
> (3) That the debtor *is* a corporation *engaged in the business* of owning, leasing, operating, controlling and managing one building and the site whereon said building is situated. • • •
>
> (13) That petitioner *is* unable to meet its debts as they mature and that it *desires* to effect a plan of reorganization pursuant to Section 77B of the Bankruptcy Act." (Italics ours.)

In the petition filed June 21, 1935, it requested (Rec. 8):

> "• • • that an order may be entered directing the Metropolitan Trust Co. to turn over said property

to your petitioner * * * for the purpose of managing and supervising said property. * * *"

The only case, other than the present decision, in which a Circuit Court of Appeals has passed upon the right of a dissolved corporation to file a voluntary petition under the Bankruptcy Act is *Vassar Foundry Co.* v. *Whiting Corp.*, 2 F. (2d) 240 (6th Cir.). There the construction of the Michigan courts, that a corporation dissolved pursuant to its statutes is non-existent, was said to be "obligatory upon the federal courts"; and it was held that the defunct corporation could not file a voluntary petition more than four months after its dissolution.

There have been cases in which lower federal courts have held that an involuntary petition may be filed against a dissolved corporation which has, upon or prior to its dissolution, become subject to the operation of the Bankruptcy Act. These decisions, however, are based on the ground that the right of creditors to the administration of the assets of an insolvent debtor under the Bankruptcy Act cannot be defeated by dissolution. *Hammond, et al.* v. *Lyon Realty Co. et al.*, (C. C. A. 4th Cir.) 59 F. (2d) 592; *Thornhill* v. *Bank of Louisiana*, Fed. Case No. 13992, *Cresson & Clearfield Coal & Coke Co.* v. *Stauffer*, (C. C. A. 3rd Cir.) 148 Fed. 981; *In re 211 East Delaware Place Building Corporation*, 76 F. (2d) 834 (C. C. A. 7th Cir.).

Moreover, there is a clear distinction between a voluntary and an involuntary petition. In the former, the bankruptcy court recognizes an entity capable of invoking its jurisdiction; in the latter, under the conventional "trust fund" doctrine, it seizes upon the assets as a *res* for administration. (*In re Double Star Brick Co.*, 210 Fed. 980.)

Recognition of the legal extinction of the respondent under the law of Illinois would not defeat the jurisdiction of the federal courts to administer the affairs of an in-

solvent corporation, as the Circuit Court of Appeals holds. The law of Illinois provided a reasonable period (two years) for winding up the affairs of a defunct corporation and during that time respondent (or its creditors) could have applied to the bankruptcy court for relief. It did not choose to do so. It did not attempt to wind up its affairs within the statutory period. Respondent offers no excuse for its neglect or refusal to comply with the statute. On the contrary, it claims a continued existence derived from the state, at the same time that it ignores the forfeiture of that right by the same authority.

The present decision, by holding that the dissolution decree is not binding in bankruptcy, in effect, extends the life of a body corporate contrary to the law of the sovereign state and creates a "legal ghost" which may exercise corporate powers and yet be immune from process, taxes and other responsibilities. The construction adopted by the Circuit Court of Appeals is not only contrary to the language and intention of Section 77B but casts doubt upon the constitutionality of that section.

Hopkins Federal Savings & Loan Association v. *Cleary*, 296 U. S. 315, 337:

> "How they [savings and loan associations] shall be formed, how maintained, how supervised, and how and when dissolved, are matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision, except when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred."

II.

IT IS ESSENTIAL TO THE EXERCISE OF JURISDICTION UNDER SECTION 77B OF THE BANKRUPTCY ACT THAT THE DEBTOR HAVE AN INTEREST IN PROPERTY WHICH CAN BE THE SUBJECT OF REORGANIZATION.

A distinction must be observed between a proceeding in bankruptcy which has for its object the surrender and liquidation of all of the debtor's property and his discharge from the claims of creditors, and a proceeding under the recent amendments (including Section 77B) which is intended to rehabilitate the debtor by permitting him to retain his property. When discharge from debt is the object, the bankrupt need not have property, but when rehabilitation is sought the ownership of property is essential to relief. The jurisdiction conferred upon the bankruptcy court by Section 77B would be futile unless a debtor corporation is possessed of a property interest upon which the elaborate machinery of administration and reorganization provided for by that Section, can operate.

We submit that Section 77B contemplates, as a minimum requirement, that the debtor corporation have property of a kind and character that will pass to a trustee in bankruptcy. The language of the section is (77B (c) (2)):

> "* * * every such trustee, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge, and consistently with the provisions of this section, all the powers of a trustee appointed pursuant to Section 44 of this Act, and if authorized by the judge, the same powers as those exercised by a receiver in equity to the extent consistent with this section, and, subject to the authorization and control of the judge, the power to operate the business of the debtor during such period, fixed or indefinite as the judge may from time to time prescribe."

A trustee appointed under Section 44 (11 U. S. C. § 72)

derives his title to the property of the bankrupt by virtue of Section 70 of the Act (11 U. S. C. § 110) which provides that the trustee—

> "shall * * * be vested by operation of law with the title of the bankrupt * * *, to all * * *
>
> "(5) property which prior to the filing of the petition, he [the bankrupt] could by any means have transferred or which might have been levied upon and sold under judicial process against him."

In determining whether the bankrupt is the owner of property within the meaning of this section, resort must be had to the law of Illinois. *Board of Trade* v. *Johnson,* 264 U. S. 1, 10. By that law, respondent, at the time of the filing of its petition, had no property which it could transfer or which could be levied upon and sold under judicial process. Its right to redeem from the sale upon the foreclosure of the mechanics' liens had expired. It had nothing but the bare possibility (subject to the first mortgage) that the certificate of sale might become void for failure of the holder to take out a deed within five years. (Smith-Hurd Ill. Rev. Stat. 1929, Chap. 77, Sec. 31.) Under the decision of the Supreme Court of Illinois, in *Commerce Vault Co.* v. *Barrett,* 222 Ill. 169, 175:

> "This right was not such an interest as to be subject to levy and sale under execution."

Nor did this bare legal title constitute property which respondent might have transferred. Two years after the decree of dissolution, respondent's corporate existence ceased, and it was powerless to make a conveyance. (*A. J. Bates Co.* v. *United States* (Ct. Cl.) 3 F. Supp. 245, 248; Fletcher, Cyclopedia Corporations (Perm. Ed. 1933), Vol. 16, Chap. 65, Section 8137, P. 940, and cases cited). After dissolution became absolute, respondent could not enlarge its title by acquiring the outstanding certificate of sale and thus bring itself within Section 77B. Under the law of Illinois, it was incapable of accepting a conveyance

or transfer. (*A. J. Bates Co.* v. *United States* (Ct. Cl.) 3 F. Supp. 245, 248; *Duffield* v. *Duffield,* 268 Ill. 29, 38.)

Another impediment to the exercise of jurisdiction by the bankruptcy court exists. The interest of respondent in the premises, after the expiration of the redemption period, does not constitute a jurisdictional *res,* under Section 77B of the Act. The legal owner of the certificate of sale might present it at any time and obtain a deed, and under the doctrine announced in *Louisville Bank* v. *Radford,* 295 U. S. 555, the bankruptcy court could not destroy or suspend his right so to perfect his title *In re Lowmon,* 79 F. (2d) 887 (C. C. A. 7th Cir.). In these circumstances, jurisdiction cannot exist when a reorganization effected under the supervision of the court could be nullified by the issuance of a deed.

The decision of the Court of Appeals attempts to surmount these objections to jurisdiction by recognizing the validity of the transfer of the certificate of sale to respondent more than four years after its dissolution. In so doing it not only recreates an entity no longer existing, but having given life to this phantom, endows it with property rights which are denied by the law of Illinois; and it violates a principle well expressed in one of its own opinions, *In re Lowmon,* 79 F. (2d) 887, 891:

> "We think there is nothing in the constitutional clause conferring upon Congress the control over bankruptcy which authorizes it to change property rights already created by the states. Under the proper exercise of that power, federal courts may be authorized to assume jurisdiction over and to administer property of bankrupts, but they must administer that property as they find it, and they have no power to create new rights in it for the benefit of either debtor or creditor."

CONCLUSION.

We respectfully submit that for the reasons stated the petition for certiorari filed herein should be granted.

Respectfully submitted,

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